

88-75

Supreme Court, U.S.

FILED

JUL 13 1988

JOSEPH E. SPANIOLO, JR.  
CLERK

NO. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

WILLIE HERMAN ELLIS,  
*Petitioner*

v.

THE STATE OF TEXAS,  
*Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO  
THE TEXAS COURT OF CRIMINAL APPEALS**

KEN J. MCLEAN  
1900 North Loop West  
Suite 500  
Houston, Texas 77018  
(713) 680-9922

*Attorney for Petitioner*  
*Willie Herman Ellis*



## QUESTIONS PRESENTED

(1) Whether petitioner's due process rights to a fair sentencing procedure were violated when the trial court relied upon erroneous and inaccurate information as a basis for the assessment of penalty?

(2) Whether petitioner's due process rights to a fair sentencing procedure were violated when the trial court judge, who did not preside at the trial on the merits, assessed penalty without accurate knowledge of the strength of the state's cases and how the testimony at punishment related to the guilt-innocence evidence?

Petitioner submits that the Texas appellate courts have decided an important question of federal law which is in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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**WILLIE HERMAN ELLIS,**  
*Petitioner*

v.

**THE STATE OF TEXAS,**  
*Respondent*

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE TEXAS COURT OF CRIMINAL APPEALS**

---

**OPINIONS BELOW**

The opinions of the Court of Appeals, First Supreme Judicial District of Texas, sitting at Houston, Texas, on direct appeal and on motion for rehearing are unpublished. Each is reprinted in the Appendix at A-1, together with the Texas Court of Criminal Appeals' refusal on Petition for Review and Motion To Rehear Petition for Review.

**JURISDICTION**

The original opinion of the court of appeals was issued on July 23, 1987. (The first brief filed by appellate

counsel accompanied the extension to file Petition For Certiorari.) Present counsel filed a Motion To Rehear in the court of appeals on September 29, 1987. The court of appeals again affirmed on motion for rehearing December 24, 1987.

A timely petition for review was filed in the Texas Court of Criminal Appeals and refused (without written opinion) on April 6, 1988. Petitioner immediately filed a motion to rehear the petition, but it was refused (again, without written opinion) on April 27, 1988. Petitioner sought and was granted an extension herein until July 13, 1988. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

### **STATEMENT OF THE CASE**

Petitioner was charged under separate indictments with five offenses of securing the execution of a document by deception in violation of V.T.C.A., Penal Code § 32.46. The indictment in each of the five cases alleged that petitioner:

Intentionally and knowingly, with intent to defraud and harm [the named complainant], hereafter referred to as the Complainant, caused the Complainant, by deception, to sign and execute the document duplicated below which affected the property and pecuniary interest of the Complainant (Tr. I, 15 in cause nos. 411,810 to 812; Tr. I, 11 in cause no. 411,814).



The jury found the petitioner guilty on all five cases as alleged in the indictments (Tr. I, 49, 96, 50, 91, 140 in cause nos. 411,810 to 814, respectively). The court assessed punishment at 8 years confinement in the Texas Department of Corrections (Tr. I, 50, 97, 51, 92, 163 in cause nos. 411,810 to 814, respectively).

### REASONS FOR GRANTING THE WRIT

At the penalty hearing on April 22, 1987, the prosecutor indicated that it might be proper, legal and judicial for the judge who tried the case to assess penalty. The presiding judge of the 180th District Court countered: "With all due respect, by the Grace of God and electorate of this State, I am the presiding judge of this court and would hope to be until at least the end of this year. Your request is denied." (S.F. VIII. 4). Judge Robert Montgomery heard the testimony, ruled on the evidence, and would have been available the first week of May. (S.F. VIII. 4).

The State urged upon the trial court an "evidentiary summary," which was represented as containing the evidence adduced at trial. (S.F. VII. 5). That assertion was absolutely inaccurate. At the request of the sentencing judge, counsel for petitioner offered the "evidentiary summary" and the attached pre-sentence report into evidence. (S.F. VII. 6). The "evidentiary summary" is set out in the Appendix at A-19.

The Supreme Court has held that convicted defendants have a due process right to be sentenced on the basis of accurate information. *United States v. Tucker*, 20 L.Ed. 2d 592 (1972); *Townsend v. Burke*, 92 L.Ed. 1690 (1948); U.S. Const. Amend. 14.

The *Townsend-Tucker* principle applies to any information which the sentencing court relies on as the basis for the sentence; the principle is not limited to errors regarding court records. See, e.g., *United States v. Harris*, 558 F.2d 366, 371 (agent's belief that defendant was involved in "Family's" drug operations); *United States v. Haygood*, 502 F.2d 166, 171 & n. 16 (7th Cir. 1974) (pending criminal charges, *cert. denied*, 419 U.S. 1114 (1975)); *United States v. Weston*, 448 F.2d 626, 633-34 (9th Cir. 1971) (allegations that defendant was major drug dealer); *United States v. Malcolm*, 432 F.2d 809, 817-19 (2nd Cir. 1970) (court erroneously failed to consider evidence of defendant's cooperation); *United States Ex Rel Welch v. Lane*, 738 F.2d 863 (7th Cir. 1984) (sentencing court erroneously thought defendant's prior conviction was for armed robbery as opposed to robbery).

It is probably beyond dispute that reliance upon hearsay in assessing punishment is not per se improper. *Williams v. Oklahoma*, 358 U.S. 576, 586, 79 S. Ct. 421, 426, 3 L.Ed.2d 516 (1959). However, the Supreme Court has never suggested that consideration of hearsay is always proper. In *Williams v. New York*, 337 U.S. 214, 247, 69 S. Ct. 1079, 1083, 93 L.Ed. 1337 (1949), the narrow issue was whether reliance on hearsay in determining an appropriate sentence was ever permissible; however, the Court specifically noted that the accuracy of the hearsay information relied on by the sentencing judge in that case "were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or afford appellant a chance to refute or discredit any of them by cross-examination or otherwise." 337 U.S. at 244, 69 S. Ct. at 1081.

The *Tucker-Townsend* principle has been read broadly to preclude reliance upon "improper or inaccurate information" in assessing penalty against a criminal defendant. *Dorszynski v. United States*, 418 U.S. 424, 94 S. Ct. 3042, 41 L.Ed.2d 855 (1974); *McGee v. United States*, 462 F.2d 243, 245 n.2 (2nd Cir. 1972); *United States v. Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973).

While most scholars and jurists agree that there is something of an inconsistency between the *Tucker-Townsend* principle and *Williams v. New York*, *supra*, namely, the former claims the defendant should not be sentenced upon invalid premises, while the latter states reliance upon hearsay allows the sentencing judge to exercise his individual discretion in an informed manner; nevertheless, both principles are premised on a concern that the penalty process be objective and fair to the individual defendant. The "explicit reliance" test, *United States v. Walker*, 469 F.2d 1377, 1380 (1st Cir. 1972) and *United States v. Espinoza*, *supra*, 481 F.2d at 556, is not dispositive of petitioner's claim since the right is not dependent upon the fortuity of the sentencer disclosing the factors relied upon in assessing penalty. For example, in *United States v. Harris*, *supra*, at 374-375 (7th Cir. 1977), there was no objection to the inaccurate information and no showing of explicit reliance. See also *McGee v. United States*, *supra*.

This writer cannot tell whether the Romanov transaction is hearsay, double hearsay, or triple hearsay. It is certainly harmful and prejudicial. The "other half dozen or more people who corresponded with the Consumer Fraud Division" is clearly double hearsay, harmful and

prejudicial. Also, the remark concerning the \$2,500.00 dollar earnest money contract is certainly hearsay, including the fact that appellant held himself out as a realtor.

Here, it is not improbable that the sentencing judge was influenced by improper factors in imposing sentence. Moreover, a common sense reading of the prosecutor's remarks, above, is "clearly" a distortion in that the evidentiary summary was not predicated upon the trial testimony. In sum, the summary is rank hearsay and an absolute misrepresentation of what occurred on the merits.

This trial judge was in the same posture as the sentencer in *United States v. Larios*, 640 F.2d 938 (9th Cir. 1981), who did not preside at the trial, assessed penalty without reading the trial transcript, relied upon at least eight (8) extraneous offenses in an evidentiary summary (which she was led to believe was part of the trial on the merits) that was premised on at least double hearsay, had no idea of the strengths and weaknesses of the state's cases, or how the "favorable" testimony on punishment by Jackie Albert Lathan, Dorothy L. Kearney, and Marta Rose Richards, the first two being named complainants, related to the testimony at guilt/innocence. (S.F. VII, 10-24, 56-66, 67-75).

No clearer abuse of discretion could be shown since petitioner was eligible for probation yet received eight (8) years confinement, two (2) years less than the maximum allowed under law. V.T.C.A. Penal Code, §§ 12.34 & 32.46.

**CONCLUSION**

For the foregoing reasons, Petitioner Willie Herman Ellis asks that his petition for certiorari be granted.

Respectfully submitted,

---

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*Attorney for Petitioner  
Willie Herman Ellis*



A-1

**APPENDIX**

**OPINION**

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In The  
COURT OF APPEALS  
For The  
First Supreme Judicial District of Texas

---

NO. 01-86-00357-CR; 01-86-00358-CR; 01-86-00359-CR;  
01-86-00360-CR; 01-86-00361-CR

---

**WILLIE HERMAN ELLIS, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

---

On Appeal from the 180th District Court  
Harris County, Texas  
Trial Court Cause Nos. 411,810; 411,811; 411,812;  
411,813; and 411,814

---

The appellant was tried on five indictments, each alleging that he had secured execution of a document by deception in violation of Tex. Penal Code Ann. sec. 32.46 (Vernon 1974). A jury found the appellant guilty on all five charges, and the court assessed his punishment at eight years confinement, to run concurrently in each case.

## A-2

The appellant's retained counsel has filed an appellate brief, which asserts two points of error:

1. That the trial court erred in denying appellant's motion to set aside the indictments.
2. That there is insufficient evidence to support the jury's verdict.

Under his first point, the appellant contends that the indictments are insufficient because they do not specifically allege how he was guilty of intent to defraud and what deception he used.

The indictments in each of the five cases alleged that appellant,

intentionally and knowingly, with intent to defraud and harm [the named complainant], hereafter referred to as the Complainant, cause the Complainant, by deception, to sign and execute the document duplicated below which affected the property and the pecuniary interest of the Complainant.

Each of the indictments tracks the language of Tex. Penal Code Ann. sec. 32.46(a) (Vernon 1976) which provides:

A person commits an offense if, with intent to defraud or harm any person, he, by deception, causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.

In *Stone v. State*, 662 S.W.2d 620 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd), an indictment that tracked the language of section 32.46(a) and set out a copy of the document that the defendant was



alleged to have caused to be signed by deception was held to be sufficient to give the defendant notice of the offense charged. The court held that section 32.46 did not require an allegation of a particular method of deception.

This case is very similar to the situation in *Stone*. Here, the indictments track the language of section 32.46, and a copy of each of the documents, which appellant was alleged to have caused to be executed, it attached to the face of each indictment. We hold that the indictments gave appellant sufficient notice of the offenses charged to enable him to prepare a defense.

We overrule the appellant's first point of error.

Under his second point of error, the appellant complains only that there is no evidence to show that he defrauded any of the complainants, because the State failed to show that any complainant made demand upon him for a reconveyance of title. He argues, without citation of any authority, that the convictions cannot stand because there is no evidence showing that he could not have removed the conveyances as clouds on the title of the complainants' properties by reconveying title to the complainants upon repayment of their loans.

We overrule this contention. Although the facts are not identical in all five cases, appellant obtained a conveyance by deed in each of the cases either by representations that the property could be repurchased by the grantor when the loan had been repaid or by representations that the papers being signed were simply a part of the loan transaction. In all five cases, appellant, having obtained an absolute conveyance from each complainant, either conveyed the title to a third person or used the deed as a basis for a mortgage loan on the property.

Viewing the evidence in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *Tisdale v. State*, 686 S.W.2d 110 (Tex. Crim. App. 1984). There was evidence from which the jury could have found that appellant intended to defraud the complainants, and that because of that deception, the complainants executed deeds to the properties conveying title to appellant. Appellant's contention, that he could have reconveyed the title upon repayment of the amounts advanced, does not absolve him for his criminal acts.

We overrule the appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ FRANK G. EVANS  
Frank G. Evans  
Chief Justice

Justices Cohen and Hoyt also participating.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered 23 July 1987.

True Copy Attest:

/s/ KATHRYN COX  
Kathryn Cox  
Clerk of Court

A-5

OPINION

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In The  
COURT OF APPEALS  
For The  
First Supreme Judicial District of Texas

---

NO. 01-86-00357-CR; 01-86-00358-CR; 01-86-00359-CR;  
01-86-00360-CR; 01-86-00361-CR

---

WILLIE HERMAN ELLIS, Appellant

v.

THE STATE OF TEXAS, Appellee

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On Appeal from the 180th District Court  
Harris County, Texas  
Trial Court Cause Nos. 411,810; 411,811; 411,812;  
411,813; and 411,814

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ON MOTION FOR REHEARING

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In his motion for rehearing, appellant brings two points of error not raised in his original appeal and a third point of error reurging insufficiency of the evidence.

We are not required to consider grounds of error presented for the first time in a motion for rehearing. *Gambill v. State*, 692 S.W.2d 106, 107 (Tex. Crim. App. 1985). However, because of the unusual circumstances in this case, we will consider the newly asserted points of error in the interest of justice.

In his first point of error, appellant complains that the trial court relied on erroneous and inaccurate information as a basis for the assessment of the punishment. Appellant refers to a portion of the evidentiary summary found in the pre-sentence report, which was introduced into evidence at the punishment phase of the trial. Appellant does not point out any specific inaccuracies in the summary. Rather, he attacks a portion of the summary as being harmful and prejudicial hearsay. At trial, appellant expressly waived objection to the introduction of the evidentiary summary into evidence.

As appellant concedes, a court may properly consider hearsay evidence in assessing punishment, and appellant has not shown that the court relied on any erroneous and inaccurate information in assessing his punishment. The first point of error is overruled.

In his second point of error, appellant complains that the sentencing judge did not preside at the trial and thus, did not have sufficient knowledge of the testimony on which to assess punishment.

Although the State suggested at trial that the judge who had heard the guilt/innocence evidence should assess the punishment, appellant made no objection on this basis. It is not improper for a different judge to sit at the punishment hearing, and that judge's decision will

not be disturbed absent a showing of abuse of discretion and harm. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). Here, the record shows that both the State and appellant had sufficient opportunity to present evidence pertaining to the court's decision on punishment. Appellant has shown no abuse of discretion. The second point of error is overruled.

In his third point of error, appellant reurges insufficiency of the evidence. Appellant concedes that there is sufficient evidence to show intent to defraud, one of the two principal elements of the offense charged. But he argues that the evidence is insufficient to show deception, urging us to adopt his interpretation of the definition of deception as requiring affirmative conduct. The Texas Penal Code includes, in its definition of deception:

(A) creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true;

(B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true.

Tex. Penal Code Ann. sec. 31.01(2)(A), (B) (Vernon 1974).

This definition applies to chapter 31 offenses, whereas this prosecution is for a chapter 32 offense. Deception is not defined in chapter 32, and according to the practice commentary to section 32.46, "the kinds of conduct included must be determined by the courts." Tex. Penal

Code Ann. sec. 32.46 (Vernon 1974). The practice commentary also states that section 32.46 "covers any form of deception," and thus is "slightly broader" than prior law that covered only "specific kinds of deception." Finally, the practice commentary states that "some guidance may be taken from the definition of deception quoted above from chapter 31 (theft offenses). Thus, "deception," as used in chapter 32, is not limited to acts within the chapter 31 definition, but may include them.

The evidence was sufficient to show that appellant created, by words or conduct, a false impression of fact that caused the complainants to execute warranty deeds in favor of appellant. Thus, the evidence is sufficient to show that appellant deceived the complainants. Appellant's third point of error is denied.

The motion for rehearing is denied.

/s/ FRANK EVANS  
Frank Evans  
Chief Justice

Justices Cohen and Hoyt also participating.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered  
December 24, 1987.

True copy attest:

/s/ KATHRYN COX  
Kathryn Cox  
Clerk of Court

A-9

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

Mail To:

Ken J. McLean  
1900 N. Loop West, Suite 500  
Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0143-88  
STYLE: Ellis, Willie Herman

April 6, 1988

On this day, the Appellant's Petition for Discretionary  
Review has been REFUSED.

COA#: 01-86-00357-CR

Thomas Lowe, Clerk

(Received April 8, 1988)

A-10

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

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Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0144-88  
STYLE: Ellis, Willie Herman

April 6, 1988

On this day, the Appellant's Petition for Discretionary  
Review has been REFUSED.

COA#: 01-86-00358-CR

Thomas Lowe, Clerk

(Received April 13, 1988)



A-11

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

Mail To:

Ken J. McLean  
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Houston, TX 77018

---

Official Notice  
Court of Criminal Appeals

RE: Case No. 0145-88  
STYLE: Ellis, Willie Herman

April 6, 1988

On this day, the Appellant's Petition for Discretionary  
Review has been REFUSED.

COA#: 01-86-00359-CR

Thomas Lowe, Clerk

(Received April 8, 1988)

A-12

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

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Ken J. McLean  
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Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0146-88  
STYLE: Ellis, Willie Herman

April 6, 1988

On this day, the Appellant's Petition for Discretionary  
Review has been REFUSED.

COA#: 01-86-00360-CR

Thomas Lowe Clerk

(Received April 8, 1988)

A-13

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

Mail To:

Ken J. McLean  
1900 N. Loop West, Suite 500  
Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0147-88  
STYLE: Ellis, Willie Herman

April 6, 1988

On this day, the Appellant's Petition for Discretionary  
Review has been REFUSED.

COA#: 01-86-00361-CR

Thomas Lowe, Clerk

(Received April 8, 1988)

A-14

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

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Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0143-88  
STYLE: Ellis, Willie Herman

April 27, 1988

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00357-CR

Thomas Lowe, Clerk

A-15

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

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Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0144-88  
STYLE: Ellis, Willie Herman

April 27, 1988

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00358-CR

Thomas Lowe, Clerk

A-16

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

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Houston, TX 77018

---

Official Notice  
Court of Criminal Appeals

RE: Case No. 0145-88  
STYLE: Ellis, Willie Herman

April 27, 1988

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00359-CR

Thomas Lowe, Clerk

A-17

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
Austin, Texas 78711

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Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0146-88  
STYLE: Ellis, Willie Herman

April 27, 1988

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00360-CR

Thomas Lowe Clerk

A-18

Court of Criminal Appeals  
P. O. Box 12308, Capital Station  
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Houston, TX 77018

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Official Notice  
Court of Criminal Appeals

RE: Case No. 0147-88  
STYLE: Ellis, Willie Herman

April 27, 1988

On this day the Appellant's Motion for Rehearing was denied.

COA#: 01-86-00361-CR

Thomas Lowe, Clerk



## EVIDENTIARY SUMMARY

ALEX ROMANOV, an engineer for Fluor, became involved with Bill Ellis in late 1983. He engaged in several investment transactions with Ellis which were unprofitable to Romanov but profitable to Ellis. One transaction included the Daisey Lindley house. Ellis related, in January 1984, that Ellis could buy for some \$18,000.00 the Lindley house and he already had it arranged to be sold to Ken O'Neil for \$39,000.00. Ellis needed, he claimed, the \$18,000.00 purchase money.

In fact, Ellis already held a deed to the property. Romanov loaned Ellis the money to buy the Lindley property. Romanov was supposed to make a \$4,000-\$5,000.00 profit for a 7-10 day investment. Ellis then told Romanov that Ellis could do another "flip" deal on a motel, the O'Henry Motel if Romanov would allow his money to ride. Romanov agreed. Ellis never returned any of Romanov's money. In August, Romanov pressed Ellis and got a written assignment of proceeds of sale on the motel (Ellis agreed that he had bought it but the sale had fallen through). In fact, Ellis had pledged the motel, which he had acquired from Sadel Henry, another "loan" deal to the Pasadena Bank as part of the Allen Foster deal in July, 1984. Romanov's assignment was worthless.

During the course of the investigation, the Consumer Fraud Division corresponded with another half dozen or more people who had conveyed their houses to Ellis in another setting. Those people had recently purchased

homes in the Houston area and now wished to sell them and could not because the net payoff was more than the depressed market value of the house.

Ellis agreed to take conveyances from these people and assured them that he was responsible for the mortgages. In fact, Ellis rented the houses, collected the rents, made no mortgage payments and ruined these people's credit by foreclosure. Ellis admitted this in front of the second and indicting Grand Jury.

In late 1985, the Consumer Fraud Division received an additional complaint against Ellis. Ellis had in the proceeding few months while holding himself out as a Realtor, taken a \$2,500.00 earnest money down-payment from a person wishing to buy a commercial building. Ellis was not a Realtor and did not remit the monies to the property owner.

